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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

ICON DIGITAL CORPORATION
et al.,

Plaintiffs and Respondents,

v.

ICON INTERNATIONAL
DIGITAL LIMITED,

Defendant;

MIXWARE, LLC,

Third Party and Appellant.

B285129

Los Angeles County
Super. Ct. No. BS162796

APPEAL from an order of the Superior Court of Los Angeles County, Edward B. Moreton, Jr., Judge. Reversed.

WFBM, Lawrence E. Duffy, Jr., John A. Kaniewski, and Steven Loi for Third Party and Appellant.

Alpert, Barr & Grant, Adam D.H. Grant, and Ryan T. Koczara for Plaintiffs and Respondents.

INTRODUCTION

Icon Digital Corporation and Icon Digital USA, LLC (collectively, the creditors) obtained a money judgment against Icon International Digital Limited (the debtor). The creditors attempted to enforce the judgment by serving a writ of execution and notice of levy on one of the debtor's distributors, Mixware, LLC. Several months after Mixware declared it held no property or obligations in favor of the debtor, the creditors moved to impose liability upon Mixware for failing to comply with the levy under Code of Civil Procedure section 701.020.¹ The trial court granted the creditors' motion and ordered Mixware to pay them \$78,161.14. Mixware appeals from that order.

Liability under section 701.020 is limited to property belonging to the debtor, or amounts due and payable to the debtor, that a third person refuses to deliver to the levying officer. Here, there is no evidence that Mixware retained the debtor's property or was obligated to make payments to the debtor at the time it was served with the levy. And although Mixware placed three purchase orders with the debtor after it was served with the levy, Mixware prepaid for those goods. Since Mixware was not required to deliver property or make payments for outstanding obligations to the levying officer, it could not be held liable to the creditors under section 701.020. We therefore reverse the order.

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

FACTS AND PROCEDURAL BACKGROUND

In February 2017, the creditors obtained a judgment in California against the debtor for \$60,129.74 based upon a sister-state judgment entered in Wisconsin. On March 15, 2017, the creditors served Mixware with a writ of execution and notice of levy (collectively, levy) totaling \$60,430.32.² The levy sought to recover “all accounts payable to the [debtor] for product purchased by Mixware, LLC from the [debtor] and any other accounts or monies due, owing and payable to the [debtor] by Mixware, LLC.” The levy instructed Mixware to complete a memorandum of garnishee and pay the levying officer “the amount that is due and payable and that becomes due and payable” during the period of execution of the lien. On March 27, 2017, Mixware responded to the levy by executing a memorandum of garnishee stating the following: “The garnishee holds neither any property nor any obligations in favor of the judgment debtor.”

Between May 16, 2017 and June 5, 2017, Mixware placed three purchase orders with the debtor as reflected in invoices for \$31,087, \$24,593, and \$15,155. As was its practice, Mixware prepaid in full each time an order was placed. Specifically, Mixware would send a purchase order to the debtor for certain products. After it received the purchase order, the debtor would inform Mixware if the requested products were available and when they could be delivered. The debtor would not, however, release the products for shipment to Mixware until it paid for them in advance.

² This amount reflected certain fees and accrued interest after judgment was entered.

On August 3, 2017, the creditors filed a motion under section 701.020 contending Mixware was wrongfully withholding \$61,620.57 for accounts payable to the debtor. The creditors also sought \$16,540.57 in attorneys' fees and costs. The creditors alleged that Mixware colluded with the debtor to avoid the judgment and continued to do business with the debtor as reflected by the three post-levy purchase orders and payments.

In opposition, Mixware argued it was not required to deliver any property to the levying officer because it never had accounts payable owed to the debtor—i.e., it always prepaid for goods received from the debtor. In the alternative, Mixware argued it had good cause for failing to deliver payments to the levying officer because the levying officer was instructed by the creditors to levy only on accounts payable to the debtor, and a prepayment for goods does not create a debt owed to the debtor or accounts payable. In fact, the prepayment of goods creates accounts receivable for Mixware because it expects to receive goods after it pays for them.

In its reply, the creditors contended that Mixware had post-levy liabilities to the debtor and, even if it did not have accounts payable subject to levy, it failed to pay the levying officer monies due, owing and payable to the debtor.

On August 29, 2017, the court granted the creditors' motion. Mixware was ordered to pay the creditors \$61,620.57, and an additional \$16,540.57 for attorneys' fees and costs. Mixware filed a timely notice of appeal from that order.

CONTENTIONS

Mixware contends the court erred in concluding it improperly withheld property or monies owed to the debtor at the time of levy, or that Mixware's post-levy prepayments to the

debtor should have been made to the levying officer as accounts payable or monies owed to the debtor.

DISCUSSION

1. Duties and Liabilities of Third Persons After Levy

“Detailed statutory provisions govern the manner and extent to which civil judgments are enforceable. In 1982, following the recommendations of the California Law Revision Commission, the Enforcement of Judgments Law (EJL) was enacted. The EJL appears in sections 680.101 through 724.260 and is a comprehensive scheme governing the enforcement of all civil judgments in California.” (*Imperial Bank v. Pim Electric, Inc.* (1995) 33 Cal.App.4th 540, 546.) For example, a judgment creditor may satisfy its judgment by levying on its judgment debtor’s accounts receivable.³ (§ 700.170.)

Section 701.020 is part of that statutory scheme, in an article discussing the duties and liabilities of third persons after being served with a levy. (§ 701.010, et seq.) After being served with a levy, a third person has a duty to pay obligations owing to the judgment debtor by delivering them to the levying officer unless there is “good cause” not to do so. (§ 701.010, subd. (b).) A third person has “good cause” not to pay the obligations where it denies the debt or has reason to dispute its amount, or if it claims the right to possession of the property. (§ 701.010, subds. (b)(1)–(2), (c).) Unless it fully complies with the levy, a third person must, within 10 days after it was served with the levy, execute a

³ An account receivable is one in which a third person owes property or other obligations to the judgment debtor. (§ 680.130; Cal. U. Com. Code, § 9102, subd. (a)(2).)

memorandum of garnishee that discloses, among other things, the amount and terms of any debt owed to the judgment debtor that is not yet due and payable at the time of levy. (§ 701.030, subd. (b)(4).) A third person who fails to deliver to the levying officer amounts owed to the judgment debtor without good cause becomes personally liable to the judgment creditor. (See §§ 701.010–701.020.) In that situation, the judgment creditor may file a motion under section 701.020 to establish a third person’s liability.⁴

2. Standard of Review

Where, as here, the issue is one of statutory interpretation and application of the statute to undisputed facts, the question is one of law subject to our independent review. (*Be v. Western Truck Exchange* (1997) 55 Cal.App.4th 1139, 1143.) The statutory provisions governing enforcement of judgments are strictly construed because they are “purely legislative creations.” (*Landstar Global Logistics, Inc. v. Robinson & Robinson, Inc.* (2013) 216 Cal.App.4th 378, 390; see *Casa Eva I Homeowners Assn. v. Ani Construction & Tile, Inc.* (2005) 134 Cal.App.4th 771, 778 [judgment lien statutes are subject to strict construction].)

⁴ In relevant part, subdivision (a) of section 701.020 provides: “If a third person is required by this article to deliver property to the levying officer or to make payments to the levying officer and the third person fails or refuses without good cause to do so, the third person is liable to the judgment creditor for [an amount representing the value of the judgment debtor’s interest in the property or the payments required to be made].”

3. Mixware’s post-levy prepayments were not for obligations due and payable to the debtor.

Mixware and the creditors agree that section 701.010 governs the duties of a third person served with a levy. That statute requires the third person to deliver to the levying officer “any of the property levied upon that is in the possession or under the control of the third person at the time of levy[,] [t]he amount of the obligation levied upon that is due and payable to the judgment debtor at the time of levy[,] [or] [¶] [a]mounts that become due and payable to the judgment debtor on the obligation levied upon during the period of the execution lien.” (§ 701.010, subd. (b)(1)–(2).)

Here, it is undisputed that, at the time of levy, Mixware had no property in its possession belonging to the debtor, or any obligation that was due and payable to the debtor. The parties disagree, however, whether Mixware’s post-levy prepayments to the debtor constitute “[a]mounts that become due and payable to the judgment debtor on the obligation levied upon during the period of the execution lien.” (§ 701.010, subd. (b)(2)(B).)⁵

Based on a literal reading of the statutory language, we conclude that Mixware’s post-levy prepayments to the debtor are not obligations “due and payable” to the debtor under section 701.010, subdivision (b)(2)(B). (See *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861 [The use of the word “and” shows the Legislature intended to construe

⁵ The lien begins on the date of levy and ordinarily continues for two years after the issuance of the writ of execution, unless the judgment is satisfied. (§ 697.710.)

conjunctively the two requirements of the statute]; *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476 [a reviewing court begins by scrutinizing the actual words of the statute, giving them their usual, ordinary meaning]; *Smith v. Selma Community Hospital* (2010) 188 Cal.App.4th 1, 21 [“When statutory language is clear and unambiguous—that is, has only one reasonable construction—courts usually adopt the literal meaning of that language.”].) Put differently, because Mixware prepaid for the goods, and the debtor did not ship them to Mixware until it received full payment, Mixware never owed a *debt* that was subject to levy. (See *Evans v. Paye* (1995) 32 Cal.App.4th 265, 270 [Statutes governing the enforcement of judgments “authorize the trial court in a summary proceeding, rather than in a creditor’s suit, to determine the existence of a debt by a third person to a judgment debtor if the court determines the third person’s denial of the alleged debt was not made in good faith.”].)

We also note that the levy only sought to recover “accounts payable to the [debtor] for product purchased by Mixware, LLC from the [debtor] and any other accounts or monies due, owing and payable to the [debtor] by Mixware, LLC.” And Mixware’s three post-levy prepayments to the debtor did not create a right to payment of a monetary obligation—i.e., those payments were not made for monies due, owing and payable to the debtor. (See Cal. U. Com. Code, § 9102, subd. (a)(2).)

In addition, as we discussed above, section 701.030 requires a third person, within 10 days after it was served with the levy, to execute a memorandum of garnishee that discloses the amount and terms of any debt owed to the judgment debtor that is not yet due and payable at the time of levy. But there is no provision in the EJJL that requires a third person to *amend* the memorandum

of garnishee, or to file a new memorandum, if it incurs a *new* post-levy obligation to the judgment debtor after the third person served its original memorandum. Indeed, as noted by a practice guide cited by the creditors, “[t]he timing of the levy is often critical [A]n execution lien attaches to property of the debtor held by a third person only *at the time of levy*. If made an instant too soon or too late, a garnishment levy may catch nothing, and simply be a waste of time and money.” (See Ahart, Cal. Practice Guide: Enforcing Judgments and Debts (The Rutter Group 2016) ¶ 6:456.)

Even though there is no evidence of a debt owed by Mixware to the debtor at the time of levy, the creditors contend Mixware’s post-levy prepayments fall within the ambit of section 701.010, subdivision (b)(2)(B) as “amounts payable.” That is, the “concept embodied” in this subdivision is “akin to wage garnishment where an employer is required to withhold and pay to a levying officer an employee/judgment debtor’s *future* earnings.” We reject this argument for two reasons.

First, nothing in the text of section 701.010 requires a third person to deliver to a levying officer *all* post-levy payments—the third person is only required to deliver amounts that *become due and payable on the obligation levied upon*. (See § 701.010, subd. (b)(2)(B).) And the remedies for one kind of enforcement mechanism do not necessarily apply to others. (See *Ilshin Investment Co., Ltd. v. Buena Vista Home Entertainment, Inc.* (2011) 195 Cal.App.4th 612, 628–629.) Indeed, where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed. (See *Rashidi v. Moser* (2014) 60 Cal.4th 718, 726; see also

Brown v. Kelly Broadcasting Co. (1989) 48 Cal.3d 711, 725 [when the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded].)

Second, a judgment creditor has other remedies against a third person to obtain prepayments made to a debtor. For example, a judgment creditor could obtain an assignment order requiring the judgment debtor to assign its payments from a third person under section 708.510. And, under section 1209, subdivision (a)(5), a creditor can then seek a contempt order against the third person for failure to comply with an assignment order. (See Ahart, Cal. Practice Guide: Enforcing Judgments and Debts, *supra*, ¶ 6:1456 [“both the judgment debtor and obligor could be held in *contempt* for failure to obey an assignment order”].) A creditor can also file a creditor’s suit against a third person that “has possession or control of property in which the judgment debtor has an interest or is indebted to the judgment debtor” and seek a restraining order enjoining the third person from making transfers to the judgment debtor. (§§ 708.210, 708.240; see *Cabral v. Soares* (2007) 157 Cal.App.4th 1234, 1242–1243.) But the creditors have not sought those remedies in this lawsuit.

DISPOSITION

The August 29, 2017, order granting the creditors' motion under section 701.020 is reversed. Mixware shall recover its costs on appeal.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, J.